Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

BRONX LEGAL SERVICES
and QUEENS LEGAL SERVICES,

Petitioners,

v.

LEGAL SERVICES CORPORATION
LEGAL SERVICES FOR NEW YORK CITY, and
LEONARD KOCZUR, Acting Inspector General
Of the Legal Services Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Legal Services Corporation Act, 42 U.S.C. §§ 2996, *et seq.* ("the LSC Act"), including its related appropriation acts, requires recipients of LSC funds to disclose, as a condition of receiving federal funding, information that is protected from disclosure as "client secrets" under state law and attorney ethical and disciplinary rules?

2. If the LSC Act does require recipients of LSC funds to disclose client secrets, is such requirement constitutional?

3. Whether Section 104 of the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (Oct. 18, 1988) (codified as 5 U.S.C. App. 3 § 8G), which established "Inspector Generals" for certain "designated Federal entities" including the Legal Services Corporation ("LSC"), is constitutionally invalid because it provides for the appointment of such inspector generals in a manner that is not permitted by the Appointments Clause of the Constitution?

STATEMENT PURSUANT TO RULE 29.6

Petitioners Bronx Legal Services and Queens Legal Services Corp. are not-profit corporations. They do not have any parent corporations or any public stock.

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OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit (which affirmed a decision of the District Court for the Southern District of New York granting summary judgment in favor of defendants) was based on an unpublished opinion (Appendix A) reported in 64 Fed. Appx. 310 (2d Cir. 2003). The decision of the District Court (Appendix B) was not officially reported.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Court of Appeals was entered on May 22, 2003.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The text of the following relevant constitutional provisions, statutes, and rules are set forth in Appendix C: Article II, Section 2, Clause 2 of the U.S. Constitution; 42 U.S.C. § 2996e(b)(3); 42 U.S.C. §§ 2996f(a)(1) and (10); 42 U.S.C. § 2996(6); Section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-59 (April 26, 1996); Section 104 of the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (Oct. 18, 1988) (codified as amended at 5 U.S.C. App. 3 § 8G); Rule 1200.19 of the attorney disciplinary rules of the Appellate Division of the New York State Supreme Court (22 NYCRR § 1200.19); Rule 1200.26(b) of the attorney disciplinary rules of the Appellate Division of the New York State Supreme Court (22 NYCRR § 1200.26).

STATEMENT OF THE CASE

This case presents for review two important questions of statutory interpretation and constitutional law: *first*, whether attorneys who receive federal funding to represent indigent clients pursuant to the LSC Act are required to disclose "client secrets" as a condition of receiving such funds and, *second*, whether Section 104 of the Inspector General Act Amendments of 1988 — which established "inspector generals" for LSC and approximately thirty other

"designated federal entities" — violates the Appointments Clause of the Constitution.[1]

Petitioners Bronx Legal Services ("BLS") and Queens Legal Services Corp. ("QLS") are non-profit corporations that provide free legal assistance in civil matters to indigent persons in Bronx and Queens Counties, New York, respectively. For more than 25 years, BLS and QLS have received funding for such services from defendant Legal Services for New York City ("LSNY") pursuant to the terms of written contracts with LSNY. LSNY, in turn, receives a significant portion of its funding from defendant LSC pursuant to the provisions of the LSC Act.

On January 11, 2000, the Inspector General of LSC ("the IG-LSC") notified LSNY and certain other LSC grant recipients that he intended to perform an "assessment" (audit) of the accuracy of the 1999 case statistics reported to LSC by grantees.[2] The procedure

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1. In addition to LSC, Congress has denominated the following as "designated federal entities" for purposes of the Inspector General Act: the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, the Federal Maritime Commission, the Commodities Futures Trading Commission, the Consumer Product Safety Commission, the Equal Opportunity Employment Commission, the National Labor Relations Board, the Federal Labor Relations Authority, the Federal Election Commission, the National Archives and Records Administration, the Federal Reserve System, the Federal Housing Finance Board, the Farm Credit Administration, the National Credit Union Administration, the U.S. International Trade Commission, Amtrak, the Appalachian Regional Commission, the Corporation for Public Broadcasting, the Denali Commission, the National Endowment for the Arts, the National Endowment for the Humanities, the National Science Foundation, the Peace Corps, the Pension Benefit Guaranty Corporation, the Smithsonian Institution, and the United States Postal Service. *See* Office of Management and Budget, "2002 List of Designated Federal Entities," 67 Fed. Reg. 46218 (July 12, 2002).

2. Not all of LSC's grantees were required to submit the information requested by the IG. The audit program contemplated that thirty grantees would be "randomly" selected to participate in Data Call

(Cont'd)

for performing the audit involved two separate "data calls." The first data call ("Data Call 1") required grant recipients to disclose, for each matter closed during 1999, the case number, date opened, problem code, closure code, case handler, office code and subrecipient number (if applicable). The second data call ("Data Call 2") required identification of the case numbers, client names, date closed, office code and subrecipient number (if applicable).[3]

On March 2, 2000, LSNY was notified by the IG-LSC that it had been selected to participate in Data Call 1, and on March 6, 2000, LSNY was notified that it had also been selected to participate in Data Call 2. LSNY promptly provided the IG-LSC with all of the information requested in Data Call 1 in the precise form requested, including the case file numbers and associated problem codes. This included information that had been provided to LSNY by petitioners for matters that were handled by BLS and QLS.[4]

(Cont'd)

1 and that sixty would be "randomly" selected to participate in Data Call 2. The sample was not actually random, however, since the selection process was "weighted" so that "the probability of selecting any given grantee was proportional to the number of closed cases reported by that grantee in 1998." As explained by the IG, "this approach maximized the random selection of larger programs, on average, and minimized the random selection of smaller programs."

3. The "case numbers" referred to in these data calls are not court cases but internal matter identification numbers used by LSC grantees and subrecipients for record-keeping purposes.

4. LSNY does not itself provide legal services on behalf of most of the low income clients in New York City, but rather contracts with other legal service organizations (including BLS and QLS) to perform such services. Thus, most of the client data that LSC had requested from LSNY was not available in files belonging to LSNY but had to be obtained from the files of other legal service organizations, including BLS and QLS. Pursuant to the provisions of the contracts between LSNY and BLS and QLS, LSNY requested that BLS and QLS provide LSNY with all of the information that had been requested by LSC in Data Call 1 and such information was provided. LSNY also requested that BLS and QLS provide LSNY with all of the information required

(Cont'd)

Shortly thereafter, LSNY informed the IG-LSC that it could not comply with Data Call 2 in the precise format requested because disclosure of client names together with the associated problem codes would violate disciplinary and ethical rules that prohibit attorneys from disclosing client secrets and confidences, including 22 NYCRR §§ 1200.19 and 1200.26 and D.R. 4-101 and D.R. 5-107(b) of the New York Lawyers Code of Professional Responsibility.[5] LSNY

(Cont'd)

by LSNY to comply with its alternate proposal for compliance with Data Call 2 (*i.e.*, using unique client identifiers in place of actual client names) and such information was provided.

5. 22 NYCRR § 1200.19 and D.R. 4-101 of the New York Lawyers Code of Professional Responsibility provide as follows: "Except when permitted under section 1200.19(c) of this Part, ***a lawyer shall not knowingly . . . reveal a confidence or secret of a client*** . . ." (emphasis added). Section 1200.19(c) (and D.R. 4-101(c)) provide that "[a] lawyer may reveal . . . [c]onfidences or secrets when permitted under [these] disciplinary rules or ***required by law*** or ***court order***" (emphasis added). "Confidences" and "secrets" are defined in § 1200.19(a) (and in D.R. 4-101(a) as follows: "***Confidence*** refers to information protected by the attorney-client privilege under applicable law, and ***secret*** refers to ***other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client***" (emphasis added). In addition to § 1200.19, 22 NYCRR § 1200.26 (and D.R. 5-107 of the Code of Professional Responsibility) provide as follows:

> Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, ***or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client*** under section 1200.19(b) of this Part.

22 NYCRR § 1200.26(b) (emphasis added). *See also*, ABA Model Rules of Professional Conduct R 1.6 (2001); D.R. 4-101 of the former ABA Code of Professional Responsibility (replaced in 1983 by the ABA Model Rules).

(Cont'd)

suggested an alternate method of disclosure (use of unique client identifiers in place of actual client names) that would permit the IG-LSC to obtain all of the information he needed to perform the audit without requiring LSNY and its subrecipients (including BLS and QLS) to violate client secrecy.

The IG-LSC refused to accept LSNY's proposal and insisted that LSNY (and BLS and QLS) provide actual client names and problem codes. Thereafter, on or about March 22, 2000, the IG-LSC served LSNY with an administrative subpoena requiring LSNY to provide actual client names along with the associated problem codes. LSNY objected to the subpoena on the ground that it required disclosure of confidential client information. However, the IG-LSC took the position that "a particular state's ethical rules are not relevant to the determination of whether the OIG may obtain access to records" and continued to insist on receiving actual client names together with the associated problem codes.

Thereafter, on April 25, 2000, the IG-LSC filed a petition for enforcement of the subpoena against LSNY in the U.S. District Court for the District of Columbia.[6] BLS and QLS were not served with subpoenas by the IG-LSC, nor were they named as respondents in the subpoena enforcement proceeding brought against LSNY. However, since LSC threatened to terminate BLS's and QLS's funding if they refused to provide the information that had been requested by the IG-LSC, on May 4, 2000, BLS and QLS commenced the present action against LSC, LSNY and the IG-LSC for injunctive and declaratory relief in the U.S. District Court for the Southern District of New York.

(Cont'd)

In considering whether they could comply with the IG's request for disclosure of client names and associated problem codes, LSNY, BLS and QLS requested advice from three noted experts in the field of legal ethics and professional responsibility; all three concluded that it would be a violation of the Code of Professional Responsibility for LSNY and its contractors to comply with the IG's request.

6. This subpoena was enforced in *United States* v. *Legal Services for New York City*, 100 F. Supp. 2d 42 (D. D.C. 2000), *aff'd*, 249 F.3d 1077 (D.C. Cir. 2001).

Defendants thereafter moved for summary judgment dismissing the complaint on the ground that LSC grant recipients are required by Section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("the 1996 Appropriations Act") to disclose the information that had been requested by the IG-LSC. BLS and QLS opposed the summary judgment motion on numerous grounds, including that neither the LSC Act nor Section 509(h) of the Appropriations Act required disclosure of client secrets.

BLS and QLS further contended that, to the extent that Section 509(h) can or must be interpreted as requiring LSC-funded attorneys to disclose client secrets as a condition of receiving federal funds, such a requirement would be unconstitutional. This was based on three grounds. First, since the regulation of attorneys is a judicial function, if Section 509(h) were interpreted to require attorneys to disclose client secrets, this would unduly interfere with the exercise of judicial power and thus violate the separation of powers principle. Second, requiring legal service organizations such as BLS and QLS to disclose the identity and secrets of their clients violates their First and Sixth Amendment rights. Third, depriving indigent clients, as a condition of receiving LSC-funded legal services, of their right to attorney-client secrecy, violates due process and equal protection.

Finally, BLS and QLS also contended that the Inspector General Act Amendments of 1988 was unconstitutional, and therefore the IG-LSC did not have the power to demand that BLS and QLS provide the information requested.[7]

On August 8, 2002, the District Court issued a memorandum decision granting defendants' motions for summary judgment. The District Court rejected all of the arguments advanced by BLS and QLS and ruled that petitioners were obligated to provide the information requested by the IG-LSC pursuant to Section 509(h) of the 1996 Appropriations Act (App. B). This decision was affirmed by the Court of Appeals for the Second Circuit in an unpublished "summary order" dated May 22, 2003 (App. A).

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7. BLS and QLS also contended that disputed factual issues existed which precluded the District Court from granting summary judgment in favor of defendants.

The courts below ruled that BLS and QLS were obligated to disclose the client secrets at issue here because such disclosure was "required by law" pursuant to Section 509(h) and thus came within the exception to Section 1200.19(c) which permits attorneys to disclose client secrets when required by law.[8] As a result of this decision, BLS and QLS — as well as all other legal service providers who accept LSC funds — are now required to disclose information that constitutes "client secrets" that is otherwise protected from disclosure by state law and/or by attorney ethical and disciplinary rules.

The decision of the courts below was based on an erroneous interpretation of the applicable statutes and one that is clearly contrary to Congress' intent and purpose in enacting the LSC Act. Furthermore, to the extent that the LSC Act can or must be interpreted as requiring such disclosure as a condition of receiving federal funds, it violates several provisions of the Constitution, including due process, equal protection, the First and Sixth Amendments, and the principle of separation of powers. Moreover, even if Section 509(h) were found to be constitutional, it was still improper for the IG-LSC to require disclosure of the client secrets at issue because the statute establishing the office of IG-LSC (Section 104 of the Inspector General Act Amendments of 1988) violates the Appointments Clause of the Constitution.

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8. The District Court indicated in its memorandum decision that there may be a question concerning whether the information at issue actually constituted "client secrets" within the meaning of Section 1200.19 (*see* App. B at 10a). The Court did not rule on this issue, however, and assumed that the information at issue constituted client secrets for purposes of deciding defendants' motions for summary judgment (*see* App. B at 11a). Accordingly, it should be assumed for purposes of this petition that the information at issue constituted client secrets within the meaning of § 1200.19 and D.R. 4-101.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT IN FEDERAL STATUTORY LAW REGARDING WHETHER LEGAL SERVICE PROVIDERS ARE OBLIGATED TO MAKE THE DISCLOSURES AT ISSUE HERE

Contrary to the decision of the courts below, there is nothing in the LSC Act that requires recipients of LSC funds to disclose their clients' secrets as a condition of receiving funds. Indeed, the statute explicitly provides that the ethical obligations and professional responsibilities of attorneys shall ***not*** be impeded or impaired. Thus, Section 2996e(b)(3) of the Act provides:

> The Corporation [LSC] shall not, under any provision of this subchapter ***interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce standards of professional responsibility generally applicable to attorneys in such jurisdiction.*** The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities. 42 U.S.C. § 2996e(b)(3) (emphasis added).

Furthermore, Section 2996f expressly requires LSC, in awarding and administering grants and contracts, to "insure the maintenance of the highest quality of service ***and professional standards*** [and] the preservation of attorney client relationships" (42 U.S.C. § 2996f(a)(1)) and to "***insure that all attorneys***, while engaged in legal assistance activities supported in whole or in part by the Corporation, ***refrain from . . . any . . . activity prohibited by the Canons of Ethics and Code of Professional Responsibility*** of the American Bar Association . . ." 42 U.S.C. § 2996f(a)(10) (emphasis added).

Congress, in setting forth its findings and declaration of purpose for the LSC Act, explicitly declared that ***"attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."*** 42 U.S.C. § 2996(6) (emphasis added). There is no reasonable basis for concluding, therefore, that disclosure of client secrets was intended or required by the LSC Act.

In granting summary judgment in favor of defendants, the District Court ruled (and the Court of Appeals affirmed) that disclosure of the information at issue was mandated by Section 509(h) of the 1996 Appropriations Act. This was an erroneous and improper interpretation of Section 509(h).[9]

First, Section 509(h) only requires disclosure of "financial records, time records, retainer agreements, client trust fund and eligibility records, ***and client names***" (emphasis added). It does not require disclosure of client names ***together with associated problem codes***, which is what the IG-LSC demanded here. Based on the plain wording of the statute, therefore, the interpretation of the courts below that Section 509(h) required disclosure of client names together with associated problem codes was unfounded and unwarranted. This is particularly true in light of the explicit provisions of the LSC Act that were designed to allow LSC-funded attorneys to comply with their professional ethical obligations. It was thus

9. In reaching their decisions regarding the effect of Section 509(h), both the District Court and the Court of Appeals were strongly influenced by the prior decision of the D.C. courts in the subpoena enforcement proceeding, which also ruled that Section 509(h) required disclosure of the information at issue. The facts in that proceeding were completely different, however, since LSNY ***had been served with a subpoena*** and the only question was whether the subpoena should be enforced. In the present case, in contrast, BLS and QLS were never served with a subpoena. Since the only issue in the subpoena enforcement proceeding was whether the subpoena should be enforced, the statements made by the D.C. courts regarding the possible effect of Section 509(h) were merely dicta.

unreasonable for the courts below to conclude that Congress intended, in enacting the 1996 Appropriations Act, to require such attorneys to disclose client secrets.

Second, it is a cardinal principle of statutory construction that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 143-44 (2001). Here, the courts below effectively and incorrectly ruled that Section 509(h) of the Appropriations Act modified or repealed Section 2996e(b)(3) of the LSC Act so as to require BLS and QLS to make the disclosures at issue. That is simply not so.

As noted above, Section 2996e(b)(3) of the LSC Act plainly provides in clear and unequivocal language that "the Corporation [LSC] ***shall not***, under any provision of this subchapter, ***interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility . . .***" 42 U.S.C. § 2996e(b)(3) (emphasis added). Furthermore, Section 2996f expressly requires LSC, in awarding grants and contracts, to "insure the maintenance of the highest quality of service ***and professional standards*** [and] the preservation of attorney client relationships" (42 U.S.C. § 2996f(a)(1)) (emphasis added) and to "***insure that all attorneys***, while engaged in legal assistance activities supported in whole or in part by the Corporation, ***refrain from . . . any . . . activity prohibited by the Canons of Ethics and Code of Professional Responsibility*** of the American Bar Association . . ." 42 U.S.C. § 2996f(a)(10) (emphasis added). Furthermore, in setting forth its findings and declaration of purpose for the LSC Act, Congress explicitly declared that ***"attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."*** 42 U.S.C. § 2996(6) (emphasis added).

In light of these plain and explicit statutory provisions, it is indisputable that Congress intended, in enacting the LSC Act: (i) to require that all attorneys who receive funding under the LSC Act abide by the ethical standards of the legal profession (including the prohibition against disclosure of client secrets); and (ii) to prohibit LSC from doing anything that would impede or interfere with an attorney's ability to abide by these ethical standards.

An important question for this Court to decide, therefore, is whether the clear provisions of the LSC Act which require attorneys to comply with professional ethical obligations and which prohibit LSC from interfering with an attorney's ability to abide by these ethical obligations were modified or repealed by Section 509(h) of the 1996 Appropriations Act. Analysis of the two statutes clearly indicates that the LSC Act was not modified or repealed by the Appropriations Act, and thus that Section 509(h) does not have the effect ascribed to it by the courts below.

First, there is nothing inherently inconsistent between Sections 2996e(b)(3), 2996f(a)(1) and 2996(6) of the LSC Act and Section 509(h) of the Appropriations Act, and thus there is no reason to believe that Congress intended to modify or repeal the former when it enacted the latter. Section 2996e(b)(3) explicitly prohibits the LSC from ***doing anything*** that would ***interfere with*** an attorney's ethical obligations, including, of course, interfering with an attorney's ethical obligation to maintain client secrets. Section 509(h), on the other hand, merely requires that "financial records, time records, retainer agreements, client trust fund and eligibility records, and client names . . . be made available to any auditor or monitor of the recipient." There is nothing in Section 509(h) that explicitly requires recipients of LSC funds to disclose ***client secrets***, and thus the two statutes are not inherently inconsistent. As this Court ruled in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), "[o]nly a clear repugnancy between the old and the new [law] results in the former giving way . . ." *Id.* at 190 (quoting from *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 456-57 (1945).

Second, even if it is assumed that Section 2996e(b)(3) and Section 509(h) are inconsistent, it is unreasonable to believe that

Congress intended to change the substantive law of the LSC Act when it enacted the 1996 Appropriations Act. It is well established that "repeals by implication are not favored." *Tennessee Valley*, 437 U.S. at 189. "This is especially true when the provision advanced as the repealing measure . . . was enacted in an appropriations bill." *Auburn Housing Authority* v. *Martinez*, 277 F.3d 138, 144 (2d Cir. 2002).

Section 509(h) comprises a mere ten ***lines*** of text in an appropriations act that is ***382 pages*** long (see 110 Stat. 1321 to 1321-381). The statute was enacted after "a historic budget confrontation" (142 *Cong. Rec.* H4046-01, H4047) (March 7, 1996) (remarks of Rep. Drier) in which, "for more than 7 months, this House held most of the departments and agencies of this Government in a state of suspended animation" (*Id.* at H4083) (remarks of Rep. Obey). There was no discussion in either the House or the Senate regarding the purpose or effect of Section 509(h),[10] and there is no reason to infer that Congress intended to repeal the clear prohibition of Section 2996e(b)(3).[11]

10. Pursuant to H. Res. 372, "general debate" in the House on the entire appropriations bill was "confined to the bill and shall not exceed one hour divided equally and controlled by the chairman and ranking minority member of the Committee on Appropriations." 142 *Cong. Rec.* H1793 (March 7, 1996). As noted by Representative Jackson-Lee in opposing H.R. 372, "[t]he Members of the House have not had sufficient time to review this bill. It is too important and affects too many Americans for us to give it only a cursory review." 142 *Cong. Rec.* H1798 (March 7, 1996).

11. The most extensive discussion regarding LSC occurred in the Senate on September 29, 1995, with respect to H.R. 2076 (a predecessor bill to H.R. 3019 which was vetoed by President Clinton). The Senate version of H.R. 2076 had proposed to eliminate all funding to LSC and replace it with "block funding" to the states for legal services. On September 29 the Senate debated an amendment to H.R. 2076 (referred to as the "Domenici Amendment") which restored funding to LSC but with numerous restrictions (as already included in the House version of the bill). Almost all of the debate that occurred in the Senate focused on whether LSC should be funded at all, not on any of the

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In considering what effect, if any, should be given to a legislative restriction contained in an appropriation act, this Court's decision in *Tennessee Valley* is particularly relevant and instructive. In that case, Congress had enacted certain environmental restrictions as part of the Endangered Species Act of 1973, the effect of which would have prevented TVA from completing and operating the nearly-completed Tellico Dam project. Meanwhile, Congress continued to appropriate funds to complete the dam. After conducting extensive hearings at which the possible application of the Endangered Species Act was explicitly discussed as a potential problem, the Senate Appropriations Committee reported that "[t]he Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage ***and directs that this project be completed as promptly as possible in the public interest.***" S. Rep. No. 94-960, at 96 (quoted at 437 U.S. at 167) (emphasis added). Similarly, the House Appropriations Committee also reported that "[t]he Committee directs that the project, for which an environmental impact statement has been completed and provided to the Committee, ***should be completed as promptly as possible***." H.R. Rep. No. 94-319, at 76 (quoted at 437 U.S. at 164) (emphasis added). Thereafter, a lawsuit was brought to enjoin

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proposed restrictions. See 141 *Cong. Rec.* S14573-02, S14588 to S14609 (Sept. 29, 1995). Similarly, when H.R. 3019 and S. 1594 (the revised House and Senate versions of the Appropriations Bill that eventually became Public Law 104-134 (*i.e.*, the Omnibus Appropriations Act) and H. Res. 415 (the House resolution authorizing consideration of the Conference version of H.R. 3019) were debated, there was no discussion of the restriction that eventually became Section 509(h). See 142 *Cong. Rec.* H1808-04, H1808, H1891-1894 (March 7, 1996); 142 *Cong. Rec.* H4046-01, H4046-4101 (April 25, 1996) (debate on H. Res. 415); 142 *Cong. Rec.* S1668-05, S1669-S1670 (March 11, 1996); 142 *Cong. Rec.* S1933-01, S1963 (March 13, 1996); 142 *Cong. Rec.* S2038-01, S2055-S2056, S2060-2062 (March 14, 1996) (discussion of Cohen-Bumpers Amendment "to permit recipients of Legal Services Corporation grants to use funds derived from non-Federal sources to testify at legislative hearings"); 142 *Cong. Rec.* S2441-03, S2454-S2457 (March 20, 1996).

further construction of the dam, and this Court ultimately ruled that the Endangered Species Act was applicable and prohibited completion of the dam.

In reaching this decision, the Court looked first to the language of the Endangered Species Act and concluded that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer. . . . This language admits of no exception." 437 U.S. at 173. The Court then looked to the language of the appropriation act to determine whether Congress intended to repeal the provision of the Endangered Species Act at issue.

The Court first noted that the appropriations at issue "represented relatively minor components of the lump-sum amounts for the ***entire*** TVA budget." *Id.* at 189 (emphasis in original). The Court next noted that "repeals by implication are not favored" (quoting *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974)), that "the intention of the legislature to repeal must be clear and manifest" (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)), and that "this policy applies with even greater force when the claimed repeal rests solely on an Appropriations Act." *Id.* at 190. The Court then explained that the Standing Rules of both houses of Congress prohibit provisions in, or amendments to, appropriations bills that change existing law (*Id.* at 190-91, citing House Rule XXI(2) and Senate Rule 16.4),[12] and noted the incongruity of inferring a repeal of legislation "by means of a procedure expressly prohibited under the rules of Congress." *Id.* at 191.

With respect to the clear and unequivocal statements that had been made by both the House and the Senate Appropriations Committees that the Tellico Dam project should be "promptly" completed notwithstanding the Endangered Species Act, this Court stated, first, that such "expressions of committees dealing with

12. These "standing rules" have been in effect since the middle of the nineteenth century. The House Rules were revised and recodified in 1999, but the prohibition against legislation in appropriations acts remained essentially the same. See House Rule XXI(2)(b) and (c). The current House Rules can be found at *www.house.gov/rules* and the current Senate Rules can be found at *www.senate.gov/*.

requests for appropriations cannot be equated with statutes enacted by Congress" (*Id.* at 191) and, second, "there is no indication that Congress ***as a whole*** was aware" of the Committee's position (*Id.* at 192) (emphasis added). In this regard, the Court noted that "[o]nly recently in *SEC* v. *Sloan*, 436 U.S. 103 (1978), we declined to presume general congressional acquiescence in a 34-year-old practice of the Securities and Exchange Commission, despite the fact that the Senate Committee having jurisdiction over the Commission's activities had long expressed approval of the practice." *Id.* at 192. Finally, the Court concluded that the statements made by the House and Senate Appropriations Committee members "'represent only the personal views of these legislators' and 'however explicit, [they] cannot serve to change the legislative intent of Congress expressed before the Act's passage.'" *Id.* at 193.

Similarly here, as in *Tennessee Valley*, there is absolutely no reason to believe that Congress, by enacting the 1996 Appropriations Act, intended to modify or repeal the specific requirement in Section 2996e(b)(3) of the LSC Act that "[t]he Corporation shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility . . ." 42 U.S.C. § 2996e(b)(3).

Accordingly, the conclusion reached by the courts below that Section 509(h) of the 1996 Appropriations Act requires recipients of federal funds under the LSC Act to disclose their clients' secrets is clearly erroneous and should be reversed.

II. AS INTERPRETED AND APPLIED BY THE COURTS BELOW SECTION 509(h) OF THE 1996 APPROPRIATIONS ACT IS UNCONSTITUTIONAL

It is well-established that "[f]ederal statutes are to be construed so as to avoid serious doubt of their constitutionality." *International Assoc. of Machinists* v. *Street*, 367 U.S. 740, 749 (1961). As explained in *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932), "[w]hen the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

In accordance with this salutary principle, petitioners submit, for the reasons explained above, that it is "fairly possible" and "entirely reasonable" to interpret Section 509(h) so as not to require disclosure of client secrets. However, to the extent Section 509(h) must be construed to require LSC-funded attorneys to disclose client secrets as a condition of receiving funds, then it is unconstitutional. This is so for several reasons.

First, under the separation of powers principle, "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving* v. *United States*, 517 U.S. 748, 757 (1996). The regulation of attorneys is essentially a judicial function and therefore Section 509(h), if so interpreted, would violate the separation of powers principle. *See Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 545-46 (2001), stating that "[a]n informed, independent judiciary presumes an informed, independent bar" and holding that "[t]he restriction imposed by the statute here threatens severe impairment of the judicial function." Similarly here, as in *Velazquez*, "courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute" agreed to violate his ethical obligations to his clients. 531 U.S. at 546.

It is spurious and illogical to say that attorneys have an ethical obligation to preserve client secrets and then say that it is permissible for LSC-funded attorneys (and only LSC-funded attorneys) to disclose their clients' secrets because Congress says they may do so. In effect, Congress would be saying that an ethical obligation that applies to all attorneys generally does not apply to attorneys who receive LSC funds. This creates two classes of attorneys and unduly infringes on the prerogative of the judiciary to regulate attorneys.

Second, to the extent that Section 509(h) is interpreted as requiring legal service organizations such as BLS and QLS to disclose the names of their clients, and indigent clients to disclose their identity,

this runs afoul of the First Amendment and the right to privacy. Case law is clear that every person, even poor people, have a constitutional right of association to consult with an attorney. *See, e.g., Denius* v. *Dunlap*, 209 F.3d 944, 953-54 (7th Cir. 2000) ("[t]he right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition"); *DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("[t]he right to retain and consult with an attorney, however, implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech"); *Martin* v. *Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982); *see also United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 585-86 (1971); *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967).

It is also well established that the government may not compel disclosure of the identity of persons exercising their First Amendment right of association ***unless there is a clearly demonstrated and compelling state need***. *See Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6-7 (1971) ("[w]hen a State seeks to inquire about an individual's . . . associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest"); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960); *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP* v. *Alabama*, 357 U.S. 449, 466 (1958).

In the present case, there is simply no compelling need for disclosure of the identity of BLS's and QLS's clients, and thus, to the extent that Section 509(h) purports to require such disclosure, it is unconstitutional.[13]

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13. The District Court rejected this argument on the ground that "there is a sound reason for the defendants' request." *See* App. B at 18a. This conclusion was grossly improper, however, because it ignored substantial evidence that had been presented by petitioners which established that defendants' request was both unnecessary and unreasonable.

Third, to the extent that Section 509(h) is interpreted as requiring LSC-funded attorneys and their indigent clients to disclose client secrets as a condition of receiving federal funds for legal services, it violates both due process and equal protection. Under the "doctrine of unconstitutional conditions," it is a violation of due process for the government to condition the receipt of federal funding on relinquishment of a constitutional right. *See, e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 545 (1983) ("the government may not deny a benefit to a person because he exercises a constitutional right"); *Burgess* v. *Lowery*, 201 F.3d 942, 946-47 (7th Cir. 2000); *McKenna* v. *Peekskill Housing Authority*, 647 F.2d 332 (2d Cir. 1981); *Board of Education* v. *Califano*, 584 F.2d 576, 588 n.38 (2d Cir. 1978). Here LSC-funded clients have a First and Sixth Amendment right of association to confer with their attorneys without unreasonable government interference and a constitutional privacy right not to have their secrets unnecessarily disclosed. If, under Section 509(h), such clients are required to disclose their identity and their secrets as a condition of receiving federally-funded legal services, this violates the doctrine of unconstitutional conditions. Furthermore, since the only class of persons required to make such disclosures are those who are indigent, the statute also violates equal protection.

The court below ruled that petitioners' equal protection argument fails because "indigence alone is not a suspect class under equal protection analysis." *See* App. B at 18a. It is, of course, true that financial need alone is usually not a suspect class for equal protection analysis. Thus, in *Maher* v. *Roe*, 432 U.S. 464 (1977), this Court ruled that it was not a denial of equal protection for a state to refuse to fund abortions for indigent women. This was because a woman does not have an "unqualified 'constitutional right to [have] an abortion'" (*Id.* at 473), but merely a right to be free from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Id.* at 474. As the Court recognized, "the central question . . . is whether [a] regulation 'impinges upon a

fundamental right explicitly or implicitly protected by the Constitution.'" *Id.* at 471.

The statute at issue here ***does*** "impinge upon a fundamental right explicitly or implicitly protected by the Constitution." Both the First Amendment and the Sixth Amendment protect the right to consult with an attorney ***free from government interference***. It may be that there is presently no clearly established constitutional requirement that the government ***provide*** attorneys to poor people in non-criminal matters, but when the government chooses to provide such attorneys, it must do so without "unduly burdensome interference." *Id.* at 474.

As recognized in *Maher*, there are situations where the Equal Protection Clause ***does require*** that special protection be afforded to indigent persons. Thus, in *Griffin* v. *Illinois*, 351 U.S. 12 (1956) and *Douglas* v. *California*, 372 U.S. 353 (1963), the Court held that "the Equal Protection Clause requires States that allow appellate review of criminal convictions to provide indigent defendants with trial transcripts and appellate counsel." *Maher*, 432 U.S. at 471 n.6. The Court in *Maher* explained that "[t]hese cases are grounded in the criminal justice system, a government monopoly in which participation is compelled." *Id.* These same concerns, however, are also true of the court system generally. Indigent clients faced with eviction proceedings, denial of SSI benefits, and a host of other legal problems have no choice but to participate in the same "government monopoly" that is the judicial system.

III. SECTION 104 OF THE INSPECTOR GENERAL ACT AMENDMENTS OF 1988 IS UNCONSTITUTIONAL

The IG-LSC was established by Section 104 of the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (1988) ("the 1988 Amendments Act") (codified as 5 U.S.C. App. 3 § 8G). Besides LSC, Section 104 also established inspector general offices for 33 other federal agencies and entities which were

denominated by Congress as "designated Federal entities."[14] Pursuant to subparagraph (c) of Section 104 (5 U.S.C. App. 3 § 8G(c)), the inspector generals of these entities (including the IG-LSC) are not appointed by the President by and with the advice and consent of the Senate, but "by the head of the designated Federal entity in accordance with the applicable laws and regulations governing appointments within the designated Federal entity."

Prior to the 1988 Amendments Act, Congress had established inspector general offices in 21 federal agencies and departments, most of which were established pursuant to the provisions of the Inspector General Act of 1978.[15] Furthermore, Section 102 of the 1988 Amendments Act established inspector general offices in certain additional agencies and departments (including the departments of Justice and Treasury). Pursuant to the 1978 Act and Section 102 of the 1988 Amendments Act, the inspector generals of these entities are all appointed by the President by and with the advice and consent of the Senate. *See* 5 U.S.C. App. 3 §§ 2, 3(a) and 11(2).

Congress has thus adopted two different procedures for appointing inspectors general: some are appointed by the President by and with the advice and consent of the Senate, whereas others (including the IG-LSC) are appointed by the "head" of the

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14. Pub. L. No. 100-504, § 104, 102 Stat. 2515, 2523 (Oct. 18, 1988). See footnote 4, *supra*, for the current list of "designated Federal entities."

15. Pub. L. No. 95-452, 92 Stat. 1101 (Oct. 12, 1978). The office of inspector general was first created by Congress in 1976 for the Department of Health, Education and Welfare. Pub. L. No. 94-505, Title III, 90 Stat. 2429 (Oct. 15, 1976), formerly codified as, 42 U.S.C. § 3521 (1976). In 1977, when Congress created the Department of Energy, it also provided for an inspector general in that department. Pub. L. No. 95-91, § 208, 91 Stat. 565, 575 (Aug. 4, 1977), formerly codified as, 42 U.S.C. § 7138 (1977). The following year Congress enacted the Inspector General Act of 1978, which established offices of inspector generals in twelve additional federal departments and agencies. By 1988 the number of inspector generals had been expanded to 21. See H.R. Rep. 100-771, at 5 (1988), *reprinted in*, 1988 U.S. Code Cong. and Adm. News 3154, 3158.

government entity.[16] This is so even though all inspector generals exercise similar powers and duties under the Inspector General Act, including the power to conduct audits and investigations and the power to subpoena documents and information. *See* 5 U.S.C. App. 3 §§ 4, 5, 6, 7 and 8G(g)(1) ("Sections 4, 5, 6 (other than subsections (a)(7) and (a)(8) thereof), and 7 of this Act shall apply to each Inspector General and Office of Inspector General of a designated federal entity. . . ."). Since the inspector general of a designated federal entity (including the IG-LSC) is a "principal officer" of the United States within the meaning of *Edmond* v. *United States*, 520 U.S. 651 (1997); *Ryder* v. *United States*, 515 U.S. 177 (1995), *Weiss* v. *United States*, 510 U.S. 163 (1994) and *Morrison* v. *Olson*, 487 U.S. 654 (1988), this procedure violates Article II, Section 2, Clause 2 of the Constitution, which requires that all principal officers of the United States be appointed by the President by and with the advice and consent of the Senate.

Accordingly, to the extent that Section 104 of the 1988 Amendments Act permits inspector generals of designated federal entities (including the IG-LSC) to be appointed in a manner not permitted by the Appointments Clause, it is unconstitutional.

A. LSC Is A Federal Entity Subject To The Appointments Clause

In determining whether Section 104 of the 1988 Amendments Act is constitutional, it is necessary to examine whether the IG-LSC is a "principal officer" of the United States within the meaning of Article II, Section 2, Clause 2 of the Constitution. This, in turn,

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16. In *National Aeronautics and Space Administration* v. *Federal Labor Relations Authority*, 527 U.S. 229, 238 n.3 (1999), a case involving an IG who had been appointed by the President by and with the advice and consent of the Senate, this Court recognized that two separate procedures had been established for appointing inspector generals. However, the validity of this difference in procedure was not at issue in that case.

requires an analysis of whether LSC is a "government entity" for purposes of applying constitutional restrictions and whether the IG-LSC is an "officer" of the United States.

In enacting the LSC Act, Congress specifically contemplated that LSC would be "a private nonmembership nonprofit corporation." 42 U.S.C. § 2996b(a); *see also* 42 U.S.C. § 2996d(e)(1) ("the Corporation shall not be considered a department, agency, or instrumentality, of the Federal Government"). As this Court made clear in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 392 (1995), however, "it is not for Congress to make the final determination of [an entity's] status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions."

Lebron held that the National Railroad Passenger Corporation ("Amtrak") was a government entity for purposes of applying constitutional limitations even though it was incorporated under the District of Columbia's Business Corporation Act and had private shareholders and even though Congress had explicitly provided that it was not an agency of the United States.[18] In making this determination, the Court looked to the nature of Amtrak to see whether it is "by its very nature, what the Constitution regards as the government":

> If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its [constitutional] restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment. 513 U.S. at 392.

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18. *See* Pub. L. No. 91-518, Title III, § 301, 84 Stat. 1327, 1330 (Oct. 30, 1970), *formerly codified as* 45 U.S.C. § 541, *repealed*, Pub. L. 103-272, § 7(b), 108 Stat. 1379 (July 5, 1994).

The Court then examined the purpose for which Amtrak was formed and the extent of government control over its operations. Based on this analysis, the Court concluded that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* at 394. As the Court explained:

> Amtrak is not merely in the temporary control of the Government (as a private corporation whose stock comes into federal ownership might be); it is established and organized under federal law for the very purpose of pursuing federal government objectives, under the direction and control of federal governmental appointees. It is in that respect no different from the so-called independent regulatory agencies such as the Federal Communications Commission or the Securities Exchange Commission, which are run by Presidential appointees with fixed terms." *Id.* at 398.

LSC clearly satisfies all of the requirements discussed in *Lebron* for determining whether it is a government entity subject to constitutional limitations. It was established and organized by Congress under federal law for the particular purpose of pursuing federal government objectives, it is wholly funded by the federal government, and it is under the direction and control of federal government employees.[19] Accordingly, there can be no question but that LSC, like Amtrak, is a government entity for purposes of constitutional restrictions.

The particular constitutional limitation that was at issue in *Lebron* was the First Amendment: plaintiff alleged it had been denied freedom of speech because Amtrak refused to display an advertisement. The constitutional restriction at issue in the present case is the

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19. LSC is managed by a board of directors consisting of eleven members, all of whom are appointed by the President by and with the advice and consent of the Senate. *See* 42 U.S.C. § 2996c(a).

Appointments Clause: petitioners claim that the 1988 Amendments Act is unconstitutional because it provides for the appointment of inspectors general (including the IG-LSC) in a manner that is not permitted by Article II, Section 2, Clause 2. Although this is a different provision of the Constitution from the one at issue in *Lebron*, that is not a significant difference. The teaching of *Lebron* is that Congress cannot avoid constitutional restrictions by disclaiming that an entity it creates for a governmental purpose is not part of the government. This is true regardless of which provision of the Constitution Congress seeks to evade. As explained in *Edmond*:

> [T]he Appointments Clause of Article II is more than a matter of "etiquette or protocol"; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches. 520 U.S. at 659.

As noted in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government ***but of the entire Republic***," and "[n]either Congress nor the Executive can agree to waive th[e] structural protection[s]" that the Clause provides. *Id.* at 880 (emphasis added). *See also*, *Weiss*, 510 U.S. at 188-89 (concurring opinion of Justice Souter).

In the present case, Congress violated this principle by establishing inspector generals (including the IG-LSC) who are not appointed in accordance with the Appointments Clause.

B. The IG-LSC Is A "Principal Officer" Of The United States And Must Be Appointed By The President With Advice And Consent Of The Senate

It is clear under *Lebron* that LSC qualifies as a government entity for purposes of applying constitutional restrictions. It is also indisputable that inspector generals in general and the IG-LSC in particular are "officers" of the United States for purposes of complying with the Appointments Clause. *See, e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]"). These two factors alone, however, do not necessarily signify that Section 104 of the 1988 Amendments Act is unconstitutional. A salient question is whether the inspector generals of "designated federal entities" (including the IG-LSC) are "principal officers" who must be appointed by the President by and with the advice and consent of the Senate or "inferior officers" who "the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, § 2, cl. 2.

This Court examined the question of "principal" versus "inferior" officer for purposes of the Appointments Clause in *Morrison*, *Weiss*, *Ryder* and *Edmond*. In *Morrison* the Court applied a four part balancing test in holding that independent counsels appointed under the Ethics in Government Act of 1978 were not principal officers. In *Weiss*, the Court held that commissioned officers who served as military judges did not need to be "reappointed" as judges, since they had already been appointed as officers by the President when they received their commissions. The Court noted, however, that "[t]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question" which "is not at issue here." 510 U.S. at 170 n.4. In *Ryder* the Court answered the question left open in *Weiss* and ruled that civilian judges on the Court of Military Review (renamed the Court

of Criminal Appeals) had to be appointed pursuant to the Appointments Clause. Finally, in *Edmond* the Court ruled that civilian judges on the Court of Criminal Appeals did not need to be appointed by the President with the advice and consent of the Senate because they were not principal officers of the United States.

The Court in *Edmond* departed from the four-part analysis that had been used in *Morrison* and applied a test based upon supervision and control. In a majority opinion in which eight of the justices joined, the Court stated that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. At a later point in the opinion the Court stated, "[w]hat is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States ***unless permitted to do so by other Executive officers***." *Id.* at 665 (emphasis added).

In a concurring opinion, Justice Souter agreed that "the term 'inferior officer' implies an official superior" and that "one who has no superior is not an inferior officer." 520 U.S. at 667. He then noted, however, that "[i]t does not follow . . . that if one is subject to some supervision and control, one is an inferior officer. Having a superior officer is necessary for inferior officer status, but not sufficient to establish it." *Id.* at 667 (citing and quoting from Justice Scalia's dissenting opinion in *Morrison*, 487 U.S. at 654, 722 ("To be sure, it is not a ***sufficient*** condition for 'inferior' officer status that one be subordinate to a principal officer. Even an officer who is subordinate to a department head can be a principal officer") (emphasis in original).

Applying these principles to the position at issue here, it is clear that the office of inspector general as created by the Inspector General Act of 1978, and as amended by the 1988 Amendments Act, is a "principal officer" of the United States and one that must be appointed by the President by and with the advice and consent of the Senate. This is so for several reasons.

First, Congress itself recognized that inspector generals are principal officers who need to be appointed by the President by and

with the advice and consent of the Senate since it provided for precisely this type of appointment in the original Inspector General Act of 1978 (*see* Pub. L. No. 95-452, § 3(a), 92 Stat. 1101 (Oct. 12, 1978) (codified as 5 U.S.C. App. 3 § 3(a)). It was not until 1988, when Congress decided to "extend" the Inspector General Act to certain "designated Federal entities" such as Amtrak and LSC that Congress provided for non-presidential appointment. *See* Pub. L. No. 100-504, § 104, 102 Stat. 2515, 2522 (Oct. 18, 1988) (codified as 5 U.S.C. App. 3 § 8G(c)). Moreover, even in enacting the 1988 Amendments Act, Congress provided for presidential appointment of the inspector generals that were newly established by Section 102 of that Act (including the inspector generals for the Departments of Justice and Treasury). *See id.*, § 102, 102 Stat. 2515 (codified as 5 U.S.C. App 3 §§ 2, 3(a) and 11(2)). One possible explanation for Congress' failure to provide for presidential appointment of the inspector generals established under Section 104 (including Amtrak and LSC) was its belief that these entities were not government entities subject to the requirements of the Appointments Clause.[20] As explained above, however, *Lebron* makes clear that this is not a valid basis for ignoring constitutional restrictions.

Second, all of the inspector generals perform essentially the same functions and have essentially the same powers.[21] There is no reason to conclude, therefore, that the inspector generals for "federal

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20. Although this explanation makes sense in the case of Amtrak and LSC, it is hard to believe that Congress thought that the SEC and the FTC (which were also included as "designated federal entities" in Section 104) were not government entities subject to the provisions of the Appointments Clause.

21. In enacting the 1988 Amendments Act, Congress explicitly contemplated that the "administratively appointed" inspectors general would have the same powers and duties as those appointed by the President: "The administratively appointed inspectors general would have the same authorities and responsibilities as those provided for in the 1978 act for the Presidentially appointed inspectors general . . ." H.R. Rep 100-771, at 15 (1988), *reprinted in*, 1988 U.S. Code Cong. & Adm. News 3154, 3167.

establishments" (*i.e.*, those appointed by the President under 5 U.S.C. App. 3 § 3(a)) are principal officers, whereas the inspector generals for "designated federal entities" (*i.e.*, those appointed under Section 104 of the 1988 Amendments Act) (5 U.S.C. App. 3 § 8G(c)) are inferior officers. A contrary result would be the equivalent of saying that ambassadors to England, Russia and France are principal officers who need to be appointed by the President, but ambassadors to Bolivia, Kenya and Senegal are inferior officers who can be appointed by the Secretary of State. *See Morrison*, 487 U.S. at 718 (dissenting opinion of Justice Scalia) ("[t]he Ambassador to Luxembourg is not anything less than a principal officer, simply because Luxembourg is small").

Finally, and most importantly, the inspector generals who are appointed under Section 104 (including the IG-LSC) are not "directed and supervised" within the meaning of *Edmond* "by others who were appointed by Presidential nomination with the advice and consent of the Senate." On the contrary, Section 104 explicitly provides that "[t]he head of the designated Federal entity shall *not* prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation." 5 U.S.C. App. 3 § 8G(d) (emphasis added).

Accordingly, for all of the forgoing reasons, Section 104 of the 1988 Amendments Act is unconstitutional for failure to comply with the Appointments Clause of the Constitution. This, in turn, means that the IG-LSC was improperly appointed and had no lawful authority to demand that BLS and QLS provide the information at issue here.

C. Even If The IG-LSC Is Not A "Principal Officer" Of The United States, His Appointment By LSC's Board of Directors Was Still Constitutionally Invalid

As shown above, petitioners submit that the IG-LSC is a "principal officer" of the United States and, therefore, the statute pursuant to which he was appointed is constitutionally invalid because it does not provide for appointment by the President by and with the advice and consent of the Senate. Even if the IG-LSC is merely

an "inferior officer," however, the method by which he was appointed would still be unconstitutional, since he was appointed by LSC's Board of Directors, which is not the "Head of a Department" within the meaning of Art. II, § 2, cl. 2.

The Appointments Clause is very explicit in providing who is authorized to appoint inferior officers, stating that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, § 2, cl. 2. Thus, inferior officers may only be appointed: (i) by the President; (ii) by a "court of law"; or (iii) by the "Head" of a "Department." *See Freytag*, 501 U.S. at 883-88; *Buckley*, 424 U.S. at 132.

In the present case, the IG-LCS was appointed by the Board of Directors of LSC pursuant to Section 104(a) of the 1988 Amendments Act (5 U.S.C. App. 3 § 8(G)(c)), which provides that the inspector general of a "designated Federal entity" "shall be appointed by the head of the designated Federal entity. . . ." Section 104(a) (5 U.S.C. App. 3 § 8(G)(a)(3)), in turn, defines "head of the designated Federal entity" to mean "any person or persons designated by statute as the head of a designated Federal entity and if no such designation exists, the chief policymaking officer or board of a designated Federal entity as identified in the list published [by the Director of the Office of Management and Budget] pursuant to subsection (h)(1) [5 U.S.C. App. 3 § 8(G)(h)(1)] of this section . . ." As specified in the list published by the OMB in accordance with section (h)(1), the "head" of LSC is LSC's Board of Directors. *See* Office of Management and Budget, "2002 List of Designated Federal Entities," 67 Fed. Reg. 46218 (July 12, 2002).

This Court examined the meaning of "Head of Department" for purposes of the Appointments Clause in *Freytag* and held (in a portion of the decision in which five justices joined) that the term must be confined ***"to executive divisions like the Cabinet-level departments."*** 501 U.S. at 886 (emphasis added). In addition to finding that this interpretation was required by constitutional policy considerations, the Court concluded that "[s]uch a limiting construction also ensures that we interpret that term in the

Appointments Clause consistently with its interpretation in other constitutional provisions." *Id.* Based on this interpretation, the Court ruled that the U.S. Tax Court was not a "department" for purposes of the Appointments Clause.

For the same reasons as articulated by this Court in *Freytag*, LSC cannot possibly be considered a "department" of the Executive Branch for purposes of the Appointments Clause and, accordingly, the Board of Directors of LSC cannot possibly be considered the "head" of a "department" for purposes of appointing the IG-LSC.[22] It necessarily follows, therefore, that the IG-LSC was not appointed in accordance with the requirements of Art. II, § 2, cl. 2.

Thus, regardless of whether the IG-LSC is deemed to be a principal officer who must by appointed by the President by and with the advice and consent of the Senate, or merely an "inferior officer" who can be appointed by the President alone, by a court of law, or by the "head of a department," it is clear that he was not appointed in any manner permitted by the Constitution.

CONCLUSION

Petitioners respectfully request that this petition for a writ of certiorari be granted. The decision of the courts below constitutes a gross departure from the requirements of federal statutory and constitutional law and raises significant issues that have far reaching national interest and should be addressed by this Court. The need for such review is especially acute in view of the fact that the statute pursuant to which the IG-LSC, as well as the inspector generals of more than thirty other federal agencies, were appointed is plainly constitutionally defective.

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22. Four justices joined in a concurring opinion in *Freytag* which indicated that the Tax Court can and should be considered as a department for purposes of the Appointments Clause. *See* 501 U.S. at 892, 915-22 (concurring opinion of Justice Scalia). Even under this view, however, LSC would still not qualify as a "department."

Respectfully submitted,

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